IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DONALD SANDERS PETITIONER

Criminal No. CRE91-68

V. No. 3:95CV48-B

UNITED STATES OF AMERICA RESPONDENT

**ORDER DENYING MOTION UNDER 28 U.S.C. § 2255**

This cause is presently before the court on the petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The petitioner has furnished three alleged constitutional violations as a basis to grant the motion. These include: (1) conviction obtained by an involuntary guilty plea; (2) denial of effective assistance of counsel; and (3) denial of assistance of appellate counsel. Upon due consideration of the motion, the exhibits submitted by the petitioner, and the record of the criminal case, the court finds that the motion is not well taken and should be denied.

**I. INVOLUNTARY GUILTY PLEA**

Rule 11 seeks to insure that the courts accept only knowing and voluntary guilty pleas by requiring that the court address the defendant in open court and inform him of and determine that he understands certain rights. Fed. R. Crim. P. 11. After all the requirements are met, the district court must make a determination based on all the evidence that there is a factual basis for the plea and that the plea is voluntary. It is the petitioner's position that his plea was not voluntary because his counsel intentionally misrepresented a plea arrangement either by

fabricating or manipulating the original plea agreement, which allegedly embodied specific references to the proscribed length of sentence each count entailed, and substituting it with a different plea agreement void of any such references.

The record of the plea taking does not support the petitioner's version of events. It is evident to the court that the petitioner was well aware of the nature of his actions, including the minimum and maximum sentences for each count of the indictment.

> THE COURT: All right. In Count 3 of this indictment you're charged with aiding and abetting, you and David Moore, aiding and abetting each other with possessing with intent to distribute approximately .12 grams of cocaine on August 16th, 1990. Are you aware of that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: The maximum penalty on that charge is not less than one year nor more than 60 years and a four million dollar fine. Have you been advised of that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: On Count 6, you are charged that on February 8th, 1990, that you did possess with intent to distribute in excess of five grams of cocaine base. And the maximum penalty on that is not less than ten years nor more than life and a four million dollar fine. Are you aware of that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Count 7 charges that on or about April 3rd of '91 you also did possess with intent to distribute approximately 41.47 grams of cocaine base. And the penalty for that is not less than ten years nor more than life and a four million dollar fine. Have you been advised of that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Count 9 charges that on April 3rd of '91 that you did knowingly carry and use a firearm in relation to a drug trafficking offense. The offense being possession with intent to distribute cocaine base. And the penalty on that is five years consecutive to others sentence and $250,000 fine. Have you been advised of that?
>
> DEFENDANT: Yes, sir.

Additionally, the court inquired even further after it appeared that the petitioner was uncertain about some of the sentencing guidelines.

> THE COURT: All right. Now, you're looking at [your attorney] like you're unhappy and displeased with something that you and he have talked about. What is your -- what's your source of your problem?
> DEFENDANT: I have no problem.
> THE COURT: All right. Now, have you been told anything different than from what I have told you here this morning?
> DEFENDANT: No, sir.
> . . .
> THE COURT: All right. Mr. Sanders, did the prosecutor accurately state the [plea] agreement between you and the government as you understand it to be?
> DEFENDANT: Yes, sir.
> THE COURT: Has anyone made any predictions or promise what sentence you would receive in the case?
> DEFENDANT: No, sir.

Clearly, the petitioner was fully aware of the terms and ramifications of the plea agreement. Having no objection to the terms as stated by the court and the government and having signed the plea agreement, Sanders cannot now complain about the sentence he received. See United States v. Sisneros, 599 F.2d 946, 947 (10th Cir. 1979) (holding when petitioner stated that there was no promise of a lighter sentence, he could not subsequently complain about sentence received). Indeed, the petitioner appears not to even complain about the sentence received, rather, his only complaint is that the plea agreement itself did not have the length of the sentences enumerated. He does not even allege that the sentence he received was different (or worse) than the durations he claims appeared on the agreement. Thus, the petitioner has wholly failed to satisfy his burden of proving an involuntary plea. An

examination of all the evidence in this case suggests just the opposite. See United States v. Smith, 844 F.2d 203, 208 (5th Cir. 1988) (holding that petitioner failed to meet his burden of proving involuntary guilty plea when petitioner admitted in open court that plea was voluntary, that he understood range of sentences, and that his lawyer made no promises regarding sentencing); Alvereze v. United States, 427 F.2d 1150, 1152 (5th Cir. 1970) (holding that petitioner failed to prove that she involuntarily pled guilty because of false and misleading promises where she admitted that no one made any promises that she would receive light sentence and that her plea was made voluntary and with full understanding of rights and consequences thereof).

**II. INEFFECTIVE ASSISTANCE OF COUNSEL**

In gauging whether counsel effectively assisted the petitioner during the trial, plea and sentencing stages, the court is guided by the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). Strickland requires that a habeas corpus petitioner establish: (1) that counsel's performance was deficient in that it fell below an objective standard of reasonable professional service; and (2) that the deficient representation prejudiced the defense so much that the results of the proceeding would have been different. Strickland, 466 U.S. at 687-88; United States v. Samples, 897 F.2d 193, 196 (5th Cir. 1990). In the context of a guilty plea case, the second element requires that the petitioner prove that but for his counsel's errors, he would not have pleaded guilty and would have insisted on

trial. Hill v. Lockhart, 474 U.S. 52, 59, 88 L. Ed. 2d 203 (1985). A petitioner's failure to establish either prong of the test warrants rejection of the claim. Bates v. Blackburn, 805 F.2d 569, 578 (5th Cir. 1986), cert. denied, 482 U.S. 916 (1987).

The petitioner contends that the cumulative egregious conduct on the part of his counsel during pretrial investigation and sentencing forced petitioner to plead involuntarily. A similar fate befalls this contention as the court has already determined that petitioner did not in fact plead involuntarily.[1] The petitioner's allegation that his defense counsel somehow misrepresented the plea agreement is not supported by the factual record before the court. As explained above, the petitioner was thoroughly questioned by the court at the taking of the plea and at sentencing. The petitioner at all times claimed he understood the nature of the charges against him, the elements that made up each crime, the rights he was waiving, the evidence the government had in support of the indictment, and the potential sentences that could be imposed by the court. Furthermore, the petitioner stated that no promises were made to him by any party as to sentencing and

[1]Additionally, the petitioner avers general incompetence by his attorney in the handling of his case. For instance, the petitioner claims that counsel should have interviewed and subpoenaed witnesses to support an acquittal and moved to suppress certain incriminating evidence. The petitioner having plead guilty, cannot now impeach that plea by claiming ineffective assistance of counsel unless he can show that it somehow affected the voluntariness or understanding with which he made his plea. Scherk v. United States, 242 F. Supp. 445, 448 (N.D. Cal.), aff'd, 354 F.2d 239, cert. denied, 382 U.S. 882 (1965). Thus, the court considers this evidence only as it relates to the voluntariness of the plea.

that he was satisfied with the representation by his attorney in the case. Thus, the petitioner fails to meet his burden under Strickland.

Additionally, the petitioner claims that his counsel's decision to take the stand during the sentencing hearing changed the nature of the relationship into an adversarial one, and therefore denied him the assistance of counsel at that stage. Again, the petitioner fails to produce evidence that this conduct falls below the objective standards of professional service. Moreover, it is abundantly clear from the record that this incident had no bearing on the final determination by the court. There is no reasonable possibility that the results would be any different if the court allowed the petitioner to withdraw his guilty plea. The record is replete with evidence overwhelmingly pointing to the guilt of the petitioner.

**III. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL**

Lastly, the petitioner contends that because his attorney filed an Anders brief and because the brief discussed only issues that were adverse to the petitioner, he was denied the right to direct appeal. This argument is without merit. First, the petitioner does not even suggest that the Strickland test is met, in that he never contends that he had a meritorious defense such that he would have prevailed on appeal. Although the petitioner has complained of inadequate briefing of the appellate issues, he never states what legal arguments should have been made. Second, the Court of Appeals for the Fifth Circuit concluded after

examining all the relevant evidence and the briefs filed by counsel that there was "no issue of arguable merit supporting an appeal." Accordingly, the appeal was dismissed. Because the Fifth Circuit held that the petitioner's counsel complied with the procedures set out in Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), the petitioner is not entitled to an appeal and therefore cannot sustain a claim of ineffective assistance of appellate counsel.

For the foregoing reasons, it is ORDERED:

That the petitioner's claim for relief pursuant to 28 U.S.C. § 2255 is DENIED.

THIS, the ___ day of December, 1995.

_____
**NEAL B. BIGGERS, JR.**
**UNITED STATES DISTRICT JUDGE**